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IN THE

Supreme Court of the United States

October Term, 1946
No. 1222

VICTOR LAGOW,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice, and the Associated Justices of the Supreme Court of the United States:

The petitioner, Victor Lagow, respectfully prays that a writ of certiorari to review the order of the United States Circuit Court of Appeals for the Second Circuit, entered in this case on December 26, 1946 (R. 83) and reported in 159 F. (2d) 245. Petition for rehearing on said order denied by said Circuit Court on January 10, 1947 (R. 88).

Statement of Jurisdiction

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U. S. C. §347 and the Rules of Civil Procedure adopted thereunder.

The Circuit Court of Appeals affirmed the order of the District Court on December 26, 1946 (R. 83). Petitioner duly filed a petition for a rehearing which was denied on January 10, 1947 (R. 88).

Opinions Below

The opinion in the District Court by Hon. Alexander A. Holtzoff, District Court Judge, appears on pages 72, 73, 74 and 75 of the Record annexed hereto and is reported in 66 Fed. Supp. 738. The opinion of the Circuit Court of Appeals (L. Hand, H. B. Chase and J. Frank, Circuit Judges) is reported in 159 F. (2d) 245, and is annexed hereto at page 82 of the Record. Denial of the rehearing was without opinion (R. 88).

Statement of the Matter Involved

The Petitioner Lagow, and the corporation of which he was sole stockholder and director, the Maple Motors Corporation, moved in the District Court for an order to suppress evidence illegally seized by the Government. The evidence consisted of the corporate records. The District Court granted the motion as to the corporation but denied it as to the individual Petitioner Lagow.

The petitions in the District Court were made before any indictment or information was filed. Therefore the order of the District Court retained the status of an independent proceeding. The order herein is a final one and is appealable under the authority of *Cogen* v. *United States*, 278 U. S. 221.

Despite the holding of *Silverthorne Lumber Co. Inc., et al.* v. *U. S.* 251 U. S. 385 and Rule 41(e), Federal Rules of Criminal Procedure, the District Court in its opinion denying the application of the individual petitioner stated:

> "Nevertheless the court cannot ignore the existence of the corporate entity. There are occasions when the court will pierce the veil of a corporate identity but that is not done for the person who incorporates the corporation * * * It is well settled that only the person who is the owner of the property seized or whose constitutional rights have otherwise been invaded by a violation of the Fourth Amendment has any standing to make a motion to suppress evidence."

The Circuit Court in affirming the order of the District Court patently disregarded the Rule 41(e) of the Rules of Criminal Procedure and the holding of this Court in the *Silverthorne* case when it said in its opinion:

> "When a man seeks to avail himself of the privilege of doing business by a corporation, even though he is the sole stockholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment.
>
> Documents which he could have protected from seizure, if they had been his own, may not be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity."

The method of the seizure of the evidence in the instant case was shocking and an outrageous violation of all civil rights. A minor employee of petitioner's corporation was taken into custody by Government agents. At the same

time the petitioner was arrested for the misdemeanor involved; selling an automobile over the ceiling price. (Maximum Price Regulation 540, Sec. 901, *et seq.* Title 50 Appendix, U. S. Code.) The misdemeanor had not been witnessed by the agents. This minor employee, one Donlin, was kept in custody overnight. The following day an Assistant United States Attorney directed him to accompany a Government agent to the closed premises of the corporation, (for which he hay a key); to open the premises and to bring certain records to the United States Attorneys office. Although Donlin protested, he was told to comply with these instructions. It is undisputed that he had no authority from his employer to procure or remove the records requested. After doing as the prosecutor directed, he was released. He was never arraigned, no charges were ever filed against him, nor was any warrant ever procured for his arrest. These facts make it clear that the sole purpose of Donlin's detention was to force him to procure the records for the Government.

The records could have been obtained through a search warrant or a subpoena at any time. The Government had ample opportunity to obtain same.

Subsequently an information was filed against Petitioner Lagow upon the evidence so illegally obtained.

The question is squarely presented whether the Government may deliberately violate the rights of some of its citizens, under the Fourth Amendment, by coercing others into obtaining evidence against them. A further question is whether the petitioner herein is a "person aggrieved" under Rule 41(e) of the Federal Rules of Criminal Pro-

cedure, and whether the Government can take advantage of the object of its pursuit by doing a forbidden act.

Questions Involved

1. Where corporate records have been illegally seized, is an individual who is the sole officer, director and stockholder of the corporation entitled to an order suppressing the illegally seized evidence as against him individually?

2. Should the Government be permitted to commit a forbidden act in order to obtain evidence?

3. Is the petitioner herein a "person aggrieved" under the Fourth Amendment?

4. Is the petitioner a "person aggrieved" under the authority of *Silverthorne et al.* v. *United States,* 251 U. S. 385?

5. Is the petitioner "a person aggrieved" and entitled to an order suppressing evidence under Rule 41(e) of the Federal Rules of Criminal Procedure?

6. Where evidence has been illegally seized must "a person aggrieved" be the owner of the property in order to avail himself of the benefits of Rule 41(e) Federal Rules of Criminal Procedure?

7. Where it has been ruled that a search and seizure is illegal, is the Government under the New Rules of Criminal Procedure permitted to use the evidence in any trial or proceeding, regardless of the interest in the property, of a person against whom it is intended to be used?

8. It is necessary for this Court to determine the meaning of Rule 41(e), Rules of Civil Procedure; to decide whether under the Rules, illegally seized evidence is to be suppressed in every criminal proceeding for the benefit of any person or whether it is suppressed only to "parties interested or aggrieved."

Reasons for the Allowance of the Writ

1. The decision herein is in conflict with the Fourth Amendment.

2. The decision herein is contrary to and disregards this Court's decision in *Silverthorne et al.* v. *United States*, 251 U. S. 385.

3. The decision is contrary to and disregards Rule 41(e) of the Federal Rules of Criminal Procedure.

4. The decision is at variance and in conflict with the only reported decision on Rule 41(e) of the Federal Rules of Criminal Procedure; *United States* v. *Janitz et al. Federal Rules Decisions*, Vol. 6, page 1 (D. C. N. J.), in the Third Circuit.

5. There is need for clarification and interpretation by this Court as to the meaning of a "person aggrevied" in Rule 41(e), Federal Rules of Criminal Procedure. This is a novel question of Constitutional level.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and

send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the case number and entitled in its docket as Victor Lagow v. United States of America, October Term 1946, and that the order of the said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated: April 3, 1947.

VICTOR LAGOW,
Petitioner,

By HERBERT ZELENKO,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated: April 3, 1947.

HERBERT ZELENKO,
Counsel for the Petitioner and member of the bar of this Court.

IN THE

Supreme Court of the United States

October Term, 1946

No.

VICTOR LAGOW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Law Involved

The laws involved are the Fourth Amendment of the Constitution of the United States, Rule 41(e) of the Federal Rules of Criminal Procedure and Maximum Price Regulation 540, Sec. 901 *et seq.*, Title 50 Appendix, U. S. Code.

Statement of Facts

Petioner Victor Lagow conducts a used automobile business in New York City under the corporate name of Maple Motors, Corporation. He is the sole director, officer and stockholder.

Shortly prior to April 18, 1946, arrangements were made by one Beecher to purchase a used 1941 Dodge car from Maple Motors, Inc. Beecher gave a $50.00 deposit to one

Nolan, an independent salesman, on account of this purchase. Out of this sum the license plates were to be procured by Maple Motors for Beecher as an accommodation. The deal was to be consummated on April 18, 1946.

Beecher then informed the Government that Maple Motors was demanding a price over the ceiling set by the Office of Price Administration. He stated that Maple Motors, Corporation wanted approximately $2,200.00 for the vehicle, whereas the ceiling price approximately $1,400.00.

On the morning of April 18, 1946, at the Office of Price Administration, Beecher was given twenty-two $100.00 bills, the serial numbers of which were recorded by two agents of the O.P.A. and a New York City police detective. He was to use this money in payment for the car.

Accompanied by these officials and his wife, Beecher proceeded to the office of the Maple Motors, Inc. When the group arrived there, Beecher and his wife entered the premises and the officers stationed themselves outside.

When Beecher and his wife entered Maple Motors, they met Lagow. The latter and the Beechers then had a convesation, the substance of which is somewhat in dispute. Substantially it amounted to the fact that Lagow did not desire to go through with the transaction but was finally prevailed upon by Beecher to do so. Beecher then demanded to inspect and drive the car. However, it was not in the premises but in a garage some distance away. Mrs. Beecher remained at the office and Beecher and Lagow went to the garage by themselves. For some reason the officers did not follow them.

Lagow testified that when they reached the garage he got into the driver's seat of the car and Beecher sat beside him. When they had driven some distance, Beecher insisted upon driving himself and Lagow acceded to the request. Lagow got out of the car on the left side nearest the driver's seat and Beecher shifted over into the place vacated by Lagow without leaving the car. Before Lagow could walk around the car and get in again, Beecher drove off. No money had been passed nor was anything else done other than this. Lagow was forced to walk part of the way back to his office and then saw a person whom he knew, driving by. This party took him the rest of the way in his car. Lagow got back to the office about ten minutes after Beecher had driven off.

Beecher's story of what had transpired at the garage was that he had taken the wheel at once and after driving a short distance he gave the twenty-two $100.00 bills to Lagow who then stated that he wished to leave the car. He asked Beecher to drive back alone and said that he, Lagow, would follow shortly on foot.

Before Lagow returned Beecher drove up to the office, and went to the rear of the premises where he spoke to one Donlin who was a clerk employed by Maple Motors. Donlin did routine work in the place, such as preparing papers and other clerical work. One of his customary tasks was to obtain license plates for prospective customers and to prepare receipts when the deal had been consummated. Donlin had, in this instance, performed those duties and had prepared a receipt. It was the practice of Maple Motors Corporation that whenever a transaction was closed, the

person receiving the money in payment was required to initial the receipt.

When Beecher returned he went up to Donlin and told him that he, Beecher, had already paid Lagow and that he wanted his receipt. He told Donlin that Lagow had directed him to inform Donlin of this and that Donlin should turn the receipt over to Beecher. Donlin did so, although he had not received the money. This receipt was not initialed.

Beecher then went outside with his wife, got into the automobile and drove away. He returned in a few minutes and called to Donlin concerning some trouble with the automobile.

In the meantime, the City detective, one Fitzpatrick, had been sitting outside of the office and he saw Beecher and his wife drive away and then return. All of the foregoing happened before Lagow returned.

When Lagow finally did arrive and entered the premises, the two O.P.A. agents and the detective seized and searched him. They did not find any of the marked money on Lagow who denied that he had received it or any part of it from Beecher. There was found on Lagow, however, the sum of $2,113 in denominations of fifty, twenty, ten and one dollar. It is conceded that this was not the money that Beecher was alleged to have had in his possession. Lagow testified, without contradiction, that it was customary for a person in his business to have large sums of money upon his person because of the nature of the business.

Both Lagow and the clerk Donlin were arrested. They were taken to a City Police Station. At the Police Station

several hours later, upon Lagow's insistence, the officers finally searched Beecher in order to find the marked money. It was not located. Lagow and Donlin were held in custody overnight and the next day brought to the office of the United States Attorney at Foley Square.

Donlin, who had been separated from Lagow since his arrest, testified that he was questioned concerning the alleged transaction; that he denied any connection with it. He was then asked about certain other transactions. He stated that he could not remember any of them. A telephone call was then made to the place of business and it was found to be closed, there being no response. Donlin, still in custody, was then directed by the Assistant United States Attorney to go with Federal Agent Addessi to the premises and procure the business records in order to permit Donlin "to refresh his recollection" (R. 68). Before leaving the United States Attorney's office Donlin protested to Agent Addessi that he did not think that this was "the right thing to do" (R. 16). Addessi informed him that it was at the United States Attorney's direction and that Donlin "better go" (R. 16).

Donlin had no authority from Lagow or any one else to remove any records from the place of business at any time (R. 59).

Donlin and the agent started up by automobile and arrived at the place of business. Donlin opened the door and went wih the Agent to the office in the rear. He opened the desk and pointed out the sales records of the Maple Motors Corporation. Agent Addessi then took the records into his own possession. After locking the door of the

premises Donlin was then taken back to the United States Attorney's office where he was questioned about the records. After some time he was released and permitted to leave.

Although Donlin had been held overnight he was never arraigned nor was any formal complaint ever made against him.

Lagow was held on a complaint with Nolan. Subsequently, an information was filed against Lagow alone, based upon the Beecher transaction and on the records taken by Agent Addessi.

ARGUMENT

I

The seizure of the corporate records being illegal, the Courts below erred in refusing to suppress this evidence as to the Petitioner Lagow.

Lagow was the only person interested in the corporation. He was the sole officer, director and stockholder. As such he was entitled, under the facts and circumstances of this case, to the constitutional protection of the Fourth Amendment. He was a "person aggrieved". The instant case is practically identical in its facts with those in *Silverthorne Lumber Co. Inc., et al.* v. *United States,* 251 U. S. 385 (1920) which holds that in this situation the individual petitioner is entitled to an order suppressing the illegally seized corporate records as against his personally.

In the *Silverthorne* case, two individuals who were officers of the corporation, were arrested in their home and

detained in custody. While in custody, the government, without authority, went to the office of the company and took corporate papers, documents, etc. All of the employees were directed to appear before the United States Attorney. Photostats and copies were made and the documents returned. Then the originals were subpoenaed, although the lower court had found that the papers previously seized had been seized in violation of the Fourth Amendment. The government, by the issuance of the subpoena, sought to avail itself of the knowledge it acquired by the previous illegal search.

This Court rejected the government's contention that although the seizure was an outrage, the government might yet study the papers, copy them, and then use the knowledge that it gained to call upon the owners in more regular form to produce them; that the protection of the constitution covered only physical possession. The court held that the government could not gain any advantage over the object of its pursuit by doing a forbidden act. At page 392 the Court said:

> "The essence of a provision forbidding acquisition of evidence in a certain way is that not merely evidence shall be used before the court, but that it shall not be used at all."

See also *United States* v. *Kraus*, 270 F. 578 (S. D. N. Y., 1921) at page 581, it is stated:

> "It is clear that the right to inspect does not give the right to seize and * * * this is enough * * * to require the return of the papers.
>
> "* * * The right to seize them in one way did not justify seizure in another. * * *"

> "The distinction is authoritatively settled by Silverthorne v. U. S., supra, where the records being of a corporate nature as I read the report were subject to subpoena."

In re Dooley, 48 F. (2d) 121 (C. C. A. 2d, 1931) involves a similar set of facts. The Court in that case correctly interpreted the holding in the *Silverthorne* case when it said at page 122:

> "If corporate property illegally seized could be used in evidence against the officers there would be little inducement offered to government agents to abstain from raids, seeing that the only detriment the prosecution would suffer in such circumstances for its unlawful conduct would be the inability to have fines imposed upon a corporate defendant."

Commenting upon the *Silverthorne* case the Court continued:

> "The court did no more than hold that where the search had invaded the rights of all the defendants, the papers seized could not be used against any of them, even though papers called for by subpoena were only corporate records."

See also *Reeve* v. *Howe,* 33 F. Supp., 619 E. D. P. A., 1940.

Here both the District Court and the Circuit Court have seen fit to disregard the clear mandate of this Court as set forth in the *Silverthorne* case when they refused to grant the relief sought for by the petitioner. Nor did these Courts even attempt to distinguish the holding in the *Silverthorne* case with the instant one. It is inconceivable that a governmental agency will be permitted to perpetrate an outrage such as was enacted in this case, in order to obtain

evidence and to have its act condoned by our courts. It must be remembered that Donlin, the minor employer who was incarcerated for almost twenty-four hours was released only after he had procured these corporate records for the Government agents and the Assistant United States Attorneys, by being forced to enter the place of his employer and to remove records without authorization; thereupon to be released without a warrant, complaint or other charge ever having been lodged against him. This was done despite the fact that the Government had ample opportunity to procure a warrant or to enter upon a legal search.

Should this state of facts be countenanced, there is reason to believe that with the constitutional bars down, citizens would be detained indiscriminately or incarcerated and released only upon condition that they procure or help to obtain evidence against their fellows.

It is respectfully urged that this Court was cognizant of the danger inherent in such a situation when it decided the *Silverthorne* case. That decision should be re-affirmed herein. The fact that the opinions of both of the Courts below are barren of any mention of the *Silverthorne* case leads to the firm belief that they both chose to disregard it.

II

Under Rule 41(e) of the Federal Rules of Criminal Procedure, the order of the Court below in regard to the Petitioner Lagow must be reversed.

Until Rule 41(e) of the Rules of Criminal Procedure was enacted, the holding in the *Silverthorne* case was narrowly interpreted by lower Federal Courts to benefit only those persons who might have an interest or "be aggrieved."

That portion of the opinion of the Circuit Court below, which states

> "nor with deference can we accept the belief in *United States* v. *Janitz*, 6 Fed. Rules, Decision 1, that Rule 41(e) in the Rules of Criminal Procedure has changed the law. The Committee has expressly declared that they had no intention of doing so; nor is there anything in the text to force us to defeat that intention. We readily read the phrase 'a person aggrieved' in the rule to cover only those persons who had been deemed 'aggrieved',"

is incomprehensible.

The official foot note to the Rule, in which the Committee's intention is set forth, reads as follows:

> "This rule is a restatement of existing law and practice with the exception hereinafter noted, 18 U. S. C. 625, 626; Weeks v. U. S., 232 U. S. 383, Silverthorne Lumber Co. v. U. S., 251 U. S. 385 * * *"

(The expression in the footnote, "with the exception hereinafter noted", concerns procedural requirements.)

The Committee having decided to use the *Silverthorne* case as one of the bases of the rule, the Courts below should have had no difficulty in granting petitioner his relief, especially since the instant case presents the identical problem.

A brief analysis of the rule as finally drafted makes it clear that the Committee intended to codify the holding in the *Silverthorne* case and to make illegally seized evidence unusable for any purpose in any trial against anyone at any time.

The rule as finally drafted commences as follows:

> "A person aggrieved by an unlawful search and seizure may move * * *"

Both official preliminary drafts of this rule, the first in 1943 and the second in 1944, commenced as follows:

> "A person whose property has been seized * * *"

Apparently it was the Committee's intention not to limit the relief of this rule to one who had a property right, either possessive or titular, to the illegally seized evidence; the deciding factor was to be the propriety of the Government's acts.

In order to ascertain with more certainty the Committee's intention it is important to examine the footnote to this rule in the preliminary drafts. In the first preliminary draft the official footnote gave as one of its legal bases the case of *People* v. *Defore*, 242 N. Y. 13, 18, 19 (1926). That case held substantially that regardless of how evidence was obtained, it could be used at a trial. This was the law of the State of New York.

In the official footnote to the second preliminary draft of this rule the *Defore* case was eliminated and the note commenced as follows:

> "The present practice of suppressing illegally obtained evidence is continued. See *Weeks* v. *U. S.*, 232 U. S. 383 (1914). Cf. *Goldstein* v. *U. S.*, 316 U. S. 114 (1942)."

In neither of the official footnotes of the first two preliminary drafts is the *Silverthorne* case mentioned. The Goldstein decision, above cited, reaffirmed the Silverthorne ruling as the law of the land. The dissenting opinion stated that the Silverthorne holding should be extended to intercepted communications. The majority opinion of this Court disagreed.

Rule 41(e) as finally adopted and the footnote thereunder, sets forth the *Silverthorne* case as the law. The basis for the rule may be found at page 392 of the *Silverthorne* case:

> "The essence of a provision forbidding acquisition of evidence in a certain way is that not merely evidence shall be used before the court, but that it shall not be used at all."

There seems to be no ambiguity whatever in the language of the rule. It states that evidence illegally obtained shall not be admitted in evidence at any hearing or trial. A further examination of the minutes of the proceedings and preliminary drafts which preceded the adoption of the rule comes close to the solution.

Under the rule suggested in the first and second preliminary drafts it was provided that illegally seized evidence,

> "* * * shall not be admissible in evidence at any hearing or trial of the proceedings in connection with which the seizure occurred."

A comparison of these preliminary drafts with the rule as adopted shows that the limitation above emphasized was finally eliminated. Prior to the adoption of this rule it was held in various circuits that unless one had a proprietary interest in the property wrongfully seized, he would not be entitled to the benefits of the Fourth Amendment. These decisions, however, restricted the interpretation of the *Silverthorne* case to its facts despite the clear mandate of this Court.

The various Circuit Courts, in numerous decisions, would refuse to grant petitions for the suppression of evidence to persons not "victims" and in each and every instance where there was not a proprietary interest, that person was held not to be a victim.

In the case of *Goldstein* v. *U. S.*, above cited, decided by this Court, both the majority opinion and the dissent, touched upon the *Silverthorne* case, but there was a close division on the question as to whether it should be extended to intercepted communications. However, by inference, even from the majority opinion in the *Goldstein* case, it is clear that in an ordinary search and seizure where it was held that evidence was illegally seized, a proprietary interest would not be necessary.

Since the Goldstein decision, the rule in question became the law and its wording is clear. To read into the wording other than the legislative intent would be contrary to the intent.

The rule of construction is that language of this type shall be given its usual and generally accepted meaning. Whether or not the words in question vested any right in anyone to complain, is immaterial. The rule must be construed as a restriction on the power of the Court to permit the introduction of tainted evidence and this is true whether the point is raised prior to or during the course of the trial. The Court should follow the intent of Congress.

In short, this Court in the *Silverthorne* case and the Committee in drafting Rule 41(e) Federal Rules of Criminal Procedure agreed that the restriction against illegal search or seizure in the Fourth Amendment to the Constitution must be upheld regardless of interest in the property but solely upon the proprietary of the Governmental acts involved.

The petitioner herein contends that even without the additional protection of Rule 41(e), he was entitled to relief by reason of the Silverthorne decision.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

HERBERT ZELENKO,
Counsel for Petitioner.